RECORD AND BRIEFS

No. 16-67

Supreme Court, U.S.
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In The

Supreme Court of the United States

RAY WHITE, MICHAEL MARISCAL,
and KEVIN TRUESDALE,

Petitioners,

v.

DANIEL T. PAULY, as Personal
Representative of the ESTATE OF SAMUEL PAULY,
and DANIEL B. PAULY, individually,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

Petitioners Ray White, Kevin Truesdale and Michael Mariscal respectfully submit this reply to respondents' brief in opposition to petitioners' petition for certiorari.

I. Respondents' brief does nothing to alleviate the effect of the Tenth Circuit's holding, which jeopardizes officer safety by requiring police officers to divine criminal suspects' actual intentions when the suspects are threatening or firing upon the officers; that standard requires an unreasonable disregard for short-term scene safety and disregards prior decisions of this Court and the Tenth Circuit itself.

In their Response Brief, respondents assert that this case is a "poor candidate" for certiorari because it is "too entangled with disputed facts" to allow for a proper review. However, this Court has not shied away from reviewing – and reversing – fact-intensive qualified immunity cases, particularly where (as here) the lower courts have egregiously misapplied settled law. *See, e.g., Mullenix v. Luna*, 136 S.Ct. 305 (2015) (per curiam); *Stanton v. Sims*, 134 S.Ct. 3 (2013) (per curiam); *Ryburn v. Huff*, 132 S.Ct. 987 (2012) (per curiam); *see also Plumhoff v. Rickard*, 134 S.Ct. 2012 (2014); *Reichle v. Howards*, 132 S.Ct. 2088 (2012). Strikingly, most of the foregoing cases are not discussed – or even mentioned – in respondents' brief. Instead, from the opening pages of their brief,

respondents chiefly rely upon *Graham v. Connor*, 490 U.S. 386 (1989), which as this Court has repeatedly noted, was "cast at a high level of generality" and offers little guidance in determining the reasonableness of an officer's actions in a particular case. *Plumhoff*, 134 S.Ct. at 2023; *see also Brosseau v. Haugen*, 543 U.S. 194, 199 (2004); App. 62.

As respondents admit, this Court must "slosh [its] way through the fact-bound morass of reasonableness" to resolve this case. *Scott v. Harris*, 550 U.S. 372, 383 (2007). However, that is not difficult to do here: despite what is asserted in respondents' brief, the basic facts of this case are undisputed. In their short encounter with the Petitioners, the Pauly brothers were the first to draw guns, the first to threaten the use of guns, and the first to actually fire any guns. Only after the rapid succession of 1) the Pauly brothers yelling "We have guns," 2) Daniel Pauly firing two shotgun blasts near Officer Truesdale's position (which was out of the line of sight of Officers White and Mariscal), and 3) Samuel Pauly pointing a loaded handgun at Officer White, did Officer White fire his weapon and shoot Samuel Pauly in self-defense.

On October 4, 2011, Officers Kevin Truesdale and Michael Marsical sought to investigate a road rage incident. App. 4. They approached the Paulys' residence, seeking to make contact with the "road rage" driver (Daniel Pauly). App. 5-6. Nonetheless, respondents repeatedly assert that the Petitioner Officers did not have probable cause to make an arrest when they first went to the Pauly residence. Whether or not the

Officers had probable cause to arrest Daniel Pauly, as opposed to simply getting Pauly's side of the story, is not at issue in this case: by statute, NMSA 1978, § 29-1-1 (1979) (police officers must "investigate all violations of the criminal laws of the state which are called to [their] attention"), the Officers had the duty to investigate Daniel Pauly's disruption of public peace and safety. While attempting to carry out that duty, the Officers were met with objectively and manifestly hostile actions by the Pauly brothers.

The Officers had a legitimate public safety concern that mandated their investigation of Daniel Pauly, which necessarily included attempting to make contact with Pauly at his home. The Officers needed to ensure that a potentially intoxicated driver did not get back onto the highway to threaten or endanger any other drivers. *See* App. 5. The alleged lack of probable cause to make an arrest did not obviate the Officers' need for caution based upon the conduct reported to the police.

Notably, the District Court specifically found that the Officers approached the Pauly house cautiously in an attempt to ensure officer safety. App. 6, 74-75, 98. Respondents do nothing to dispute the finding that Officers White and Mariscal actually observed someone (Samuel Pauly) lower the top window pane of the front window of the Pauly house and aim a pistol directly at Officer White. *See* App. 8, 54, 78. Indeed, the need for caution was in fact later validated by Daniel Pauly's firing of a shotgun after the Officers arrived at his house. Paradoxically, respondents' own statement of facts glosses over the District Court's specific finding

that decedent Samuel Pauly pointed a *loaded* handgun at Officer White. App. 77.

Respondents claim that Officer White was at the Paulys' house "for several minutes" prior to shots being fired. However, as noted by the Tenth Circuit panel in its original opinion, while Officers Truesdale and Mariscal were attempting to get the Pauly brothers to come outside, Officer White arrived and approached the house. App. 7. Officer White saw individuals moving inside the house and, within seconds of his arrival, heard one of the Pauly brothers threaten, "We have guns." App. 7, 53. Moments later, Officer Truesdale saw Daniel Pauly run to the back of the house. App. 7, 8. Officer Truesdale left his position of cover at the front of the house and ran around the side of the residence in order to ensure that Daniel did not go out the back door and flank him and his fellow officers. *See id.* Officer White positioned himself behind a low rock wall – with his head and upper body still visible – that ran along the front of the house. *See* App. 7, 57. Officer Mariscal took cover behind a truck parked in front of the Pauly house. App. 7.

Immediately thereafter, Daniel Pauly fired two blasts from his shotgun, which Officer Truesdale believed were fired at him. App. 8. At no time did Truesdale fire or attempt to fire his weapon. Officer White heard Daniel Pauly's shotgun blasts coming from the back of the house, and feared that Officer Truesdale had been shot. App. 8. As Daniel Pauly fired his shotgun, Officers White and Mariscal saw Samuel Pauly lower the top pane of the front window, extend his arm

parallel with the ground, and point a pistol at Officer White (which was, as the District Court noted, loaded). *Id.* In fear for his life, and fearing for the life and safety of Officer Mariscal, Officer White fired his weapon. Despite this, the Tenth Circuit improperly affirmed the District Court's denial of the Officers' qualified immunity motions.

Ultimately, certioriari is appropriate where (as in the present case)

> a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter . . . or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power.

Sup. Ct. R. 10(a). Certiorari is also appropriate where the lower court "has decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c); *see also Allapattah Servs., Inc. v. Exxon Corp.*, 362 F.3d 739, 745 (11th Cir. 2004) (Tjoflat, J., dissenting), *cert. granted, Exxon Corp. v. Allapattah Servs., Inc.*, 543 U.S. 924 (2004), *reversed and remanded*, 545 U.S. 546 (2005).

Long-standing jurisprudence from across the federal courts holds that if an assailant so much as points a gun at a police officer, the officer is authorized to respond with deadly force. The Tenth Circuit's opinion in the present case upends this long-settled precedent.

Certiorari is doubly important in the present case, given that the Tenth Circuit panel's decision contradicts long-standing precedent from the Tenth Circuit itself, as well as this Court's recent decisions on qualified immunity.

II. The precedent cited by the respondents does nothing to cure the officer safety issue created by the Tenth Circuit's holding.

The Tenth Circuit itself has recognized three types of citizen-police encounters: (1) consensual encounters, which do not implicate the Fourth Amendment; (2) investigative detentions, which must be justified by reasonable, articulable and individualized suspicion, and (3) arrests. *See, e.g., United States v. White*, 584 F.3d 935, 944-45 (10th Cir. 2009). What starts out as a consensual encounter may evolve into an investigative detention, and, of course, a detention may evolve into an arrest. *See id.* In fact, no reasonable suspicion needs to be shown in order to justify a "knock and talk" encounter. *United States v. Cormier*, 220 F.3d 1103, 1109 (9th Cir. 2000) (citing *Florida v. Bostick*, 501 U.S. 429, 434 (1991)).

There are no "hard-and-fast rules" regarding the reasonableness of force used during investigatory encounters, and the Tenth Circuit itself has eschewed establishing any bright-line standards for permissible conduct. *See United States v. Merkley*, 988 F.2d 1062, 1064 (10th Cir. 1993). A law enforcement officer, faced

with the possibility of danger, has a right to take reasonable steps to protect himself during such an encounter, regardless of whether probable cause to arrest exists. *See id.* Nonetheless, respondents suggest that no probable cause supported the Officers' presence at the Pauly house in the first place, repeating a point noted by the Tenth Circuit panel below. App. 5 ("[t]he officers all agreed that there was not enough evidence or probable cause to arrest Daniel [Pauly], and that no exigent circumstances existed at the time"). Of course, this does not obviate the probable cause that Officer White had – based on the Paulys' threats and actions – to believe that there was a threat of serious physical harm to himself or to his fellow officers. *Estate of Larsen v. Murr*, 511 F.3d 1255, 1260 (10th Cir. 2008). The Tenth Circuit panel's decision – and the respondents' arguments in support thereof – fly in the face of the Circuit's own precedent, as well as that of this Court.

Respondents note that the Tenth Circuit has adopted a "sliding scale" to determine when law is clearly established, such that "[t]he more obviously egregious the conduct in light of prevailing constitutional principles, the less specificity is required from prior case law to clearly establish the violation." *Casey v. Federal Heights*, 509 F.3d 1278, 1284 (10th Cir. 2007). Indeed, the majority's opinion below is one of several recent decisions whereby the Tenth Circuit utilized this improper "sliding-scale approach" to the "clearly established law" inquiry. *See, e.g., Sanchez v. Hartley*, 810 F.3d 750, 759-60 (10th Cir. 2016); *Estate of Booker*

v. Gomez, 745 F.3d 405, 427 (10th Cir. 2014); *Fogarty v. Gallegos*, 523 F.3d 1147, 1161 (10th Cir. 2008); *see also Waters v. Coleman*, 632 F. App'x 431, 435 (10th Cir. Nov. 3, 2015) (unpublished); *Ornelas v. Lovewell*, 613 F. App'x 718, 721-22 (10th Cir. June 1, 2015) (unpublished). However, no basis in this Court's precedent supports the Tenth Circuit's "sliding scale" qualified immunity approach, and this Court's review of the Tenth Circuit's decision here is necessary to further clarify the correct clearly established qualified immunity analysis for all of the Circuit Courts.

Respondents cite *Yates v. City of Cleveland*, 941 F.2d 444 (6th Cir. 1991) as a "seminal case" in which a police officer entered a dark hallway at a private residence in the early morning hours without identifying himself; the officer later shot and killed one of the house's residents. However, the more egregious facts of *Yates* are far too dissimilar from the facts of the present case, particularly given that none of the Petitioner Officers actually entered (or attempted to enter) the Pauly house, and because the Pauly brothers (unlike the decedent in *Yates*) were armed with loaded guns that they either used in the presence of, or pointed at, the Officers.

Notably, the Sixth Circuit later minimized its own ruling in *Yates*, as that case was "driven by two obviously conflicting versions of the facts," and that the *Yates* Court's "comment about the unreasonableness of the officer's conduct" was dictum and "a 'thing said in passing.'" *Chappell v. City of Cleveland*, 585 F.3d 901, 914-15 (6th Cir. 2009). Finding *Yates* to be

distinguishable on its facts, the Sixth Circuit noted that, even assuming the officers in *Chappell* had not effectively identified themselves and that the decedent still failed to recognize them as such even as they stood in his bedroom with flashlights and handguns trained on him, the decedent chose to continue advancing toward the officers with a knife held high until he reached a point within five to seven feet of them before they fired in self-defense. *Id.* at 915-16.

Chappell is particularly instructive here: in that case, detectives conducting a protective sweep inside the decedent's residence claimed that they identified themselves several times as "Cleveland Police" using a "command voice." *Chappell*, 585 F.3d at 913. However, three witnesses, including other officers, testified that they did not hear the detectives announce "Cleveland Police." The district court concluded that this "discrepancy" created a genuine dispute of material fact, reasoning that the detectives' failure to identify themselves as they cleared the interior of a dark house could potentially justify a jury finding the detectives' eventual use of deadly force objectively unreasonable. *Id.* The Sixth Circuit disagreed, noting that the "three witnesses' failure to hear the 'Cleveland Police' announcements does not refute the detectives' testimony that they in fact made several such announcements; it establishes only that the witnesses didn't hear the announcements. In other words, the discrepancy doesn't actually raise a *genuine* dispute of fact." *Id.* at 914 (emphasis in original); *see also Drewitt v. Pratt*, 999 F.2d 774, 778-80 (4th Cir. 1993) (rejecting a claim that an

officer who resorts to deadly force in self-defense violates the Fourth Amendment if he unreasonably provokes the shooting by failing to identify himself as a police officer).

In *Chappell*, the Sixth Circuit applied a "temporally segmented analysis" to the excessive force claims raised. *Chappell*, 585 F.3d at 914. The Tenth Circuit panel below failed to conduct the same kind of rigorous segmenting required in this kind of case. Under the "segmenting" approach, a Court is to "'carve up' the events surrounding the challenged police action[s] and evaluate the reasonableness of the force by looking only at the moments *immediately preceding* the officer's use of force" (emphasis supplied), an approach that "applies even to encounters lasting very short periods of time." *Greathouse v. Couch*, 433 F. App'x 370, 372 (6th Cir. July 22, 2011) (unpublished).

The rationale behind the rule is obvious:

> The time-frame is a crucial aspect of excessive force cases. Other than random attacks, all such cases begin with the decision of a police officer to do something, to help, to arrest, to inquire. If the officer had decided to do nothing, then no force would have been used. In this sense, the police officer always causes the trouble. But it is trouble which the police officer is sworn to cause, which society pays him to cause and which, if kept within constitutional limits, society praises the officer for causing.

Dickerson v. McClellan, 101 F.3d 1151, 1161 (6th Cir. 1996) (quoting *Plakas v. Drinski*, 19 F.3d 1143, 1150 (7th Cir.) (refusing to examine events prior to threat against the officer to determine whether officer could have avoided situation which led to use of deadly force), *cert. denied*, 513 U.S. 820 (1994)).

Unlike the Tenth Circuit's "sliding scale" approach, the segmenting approach employed by other circuits is fully consistent with this Court's instruction that lower courts are to look to the totality of the circumstances to determine whether the force used by police officers was reasonable. *Tennessee v. Garner*, 471 U.S. 1, 8-9 (1985). Consequently, this Court should direct the Circuit Courts to apply a temporally segmented analysis to the allegedly erroneous actions taken by police officers in excessive force cases. *See Chappell*, 585 F.3d at 914; *see also Fancher v. Barrientos*, 723 F.3d 1191, 1199-1200 (10th Cir. 2013); *Claybrook v. Birchwell*, 274 F.3d 1098, 1103 (6th Cir. 2001); *Whitlow v. City of Louisville*, 39 F. App'x 297, 305-06 (6th Cir. July 1, 2002) (unpublished) (rejecting the "seemingly broader standard" for excessive force claims adopted by the Tenth Circuit in *Allen v. Muskogee*, 119 F.3d 837, 840 (10th Cir. 1997) and *Sevier v. City of Lawrence*, 60 F.3d 695 (10th Cir. 1995) in favor of the segmenting analysis set forth in *Dickerson* and *Claybrook*, *supra*). At the very least, this Court should grant certiorari to resolve the differences among the Circuits and to clarify the standards to be employed in Fourth Amendment qualified immunity cases. *Compare, e.g., Billington v. Smith*, 292 F.3d 1177, 1186-89

(9th Cir. 2002) (noting differences among Circuit Courts' approaches to Fourth Amendment analysis and stating that officers can be "held liable for using excessive force [where] their reckless and unconstitutional provocation created the need to use force"), *with Livermore v. Lubelan*, 476 F.3d 397, 406-07 (6th Cir. 2007) (rejecting *Billington* and relying upon Circuit opinions scrutinizing only the seizure itself, not the events leading to the seizure, for reasonableness).

Respondents are flatly incorrect when they suggest Petitioners do not seek review of the ruling that their allegedly "reckless conduct" unreasonably created the dangerous situation leading to Officer White's need to shoot Samuel Pauly. *See* App. 30, 85. Under a temporally segmented analysis, the Petitioners are unquestionably entitled to qualified immunity, as the Pauly brothers' manifestly hostile actions – not the actions of the Officers themselves – necessitated the need for Officer White's use of force. Again, immediately before Officer White fired the fatal shot, the Paulys yelled "We have guns," then Daniel Pauly fired two shotgun blasts, then Samuel Pauly pointed a loaded gun at Officer White. Officer White did nothing to create the deadly force threat suddenly presented by the Paulys, and Officer White's use of force to defend himself and the other officers was unquestionably reasonable under the circumstances.

CONCLUSION

This Court should grant the petition for a writ of certiorari and reverse the decision of the Tenth Circuit Court of Appeals.

Respectfully submitted,

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